-1482

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1482

EVO R. MANZARDO,

Petitioner,

vs.

THE PULLMAN COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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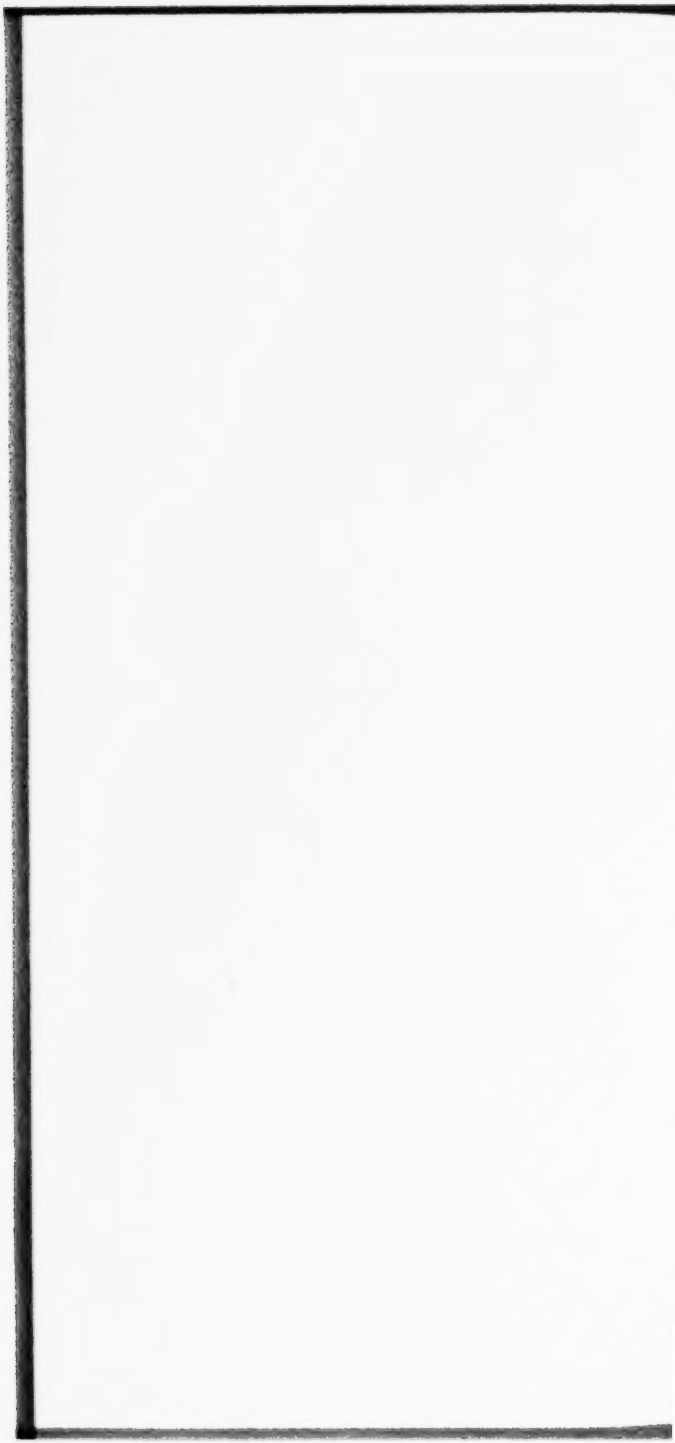

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* Cases chiefly relied upon.

IN THE

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No.

EVO R. MANZARDO,

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vs.

THE PULLMAN COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioner Evo R. Manzardo, et al., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Seventh Circuit appears in the appendix hereto. The Opinion of the District Court for the Northern District of Illinois, Eastern Division appears in the appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Sevent
was entered on December 12, 1973. A timely Pet
Rehearing was denied on January 7, 1974, and this
for Certiorari was filed within ninety days of that dat

The Court's jurisdiction is invoked under 28 U. S. C
1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the Seventh Circuit is in direct con
this Court's decision in *Czosek* v. *O'Mara,* when it hel
action could not be maintained by railroad employee
their union for breach of the duty of fair representatio
of a Public Law Board decision under the Railway L
that the employer had properly denied them severanc

2. Whether an action against a union for the breac
of fair representation has its source in the laws of t
States and is, therefore, maintainable under Title 28
Section 1337?

STATUTORY PROVISIONS INVOLVED.

28 U. S. C. § 1337

§ 1337. *Commerce and anti-trust regulations.*

The district courts shall have original jurisdicti
civil action or proceeding arising under any Act o
regulating commerce or protecting trade and
against restraints and monopolies. June 25, 194
62 Stat. 931.

45 U. S. C. § 153, SECOND

*System, group, or regional boards: establishment
tary agreement; special adjustment boards:
ment, composition, designation of represen*

Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards.

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed

by the carrier or representative requesting th
ment of the special board, shall constitute the l
member of the board shall be compensated l
he is to represent. The members of the board s
shall determine all matters not previously a
by the carrier and the representative of th
with respect to the establishment and jurisdi
board. If they are unable to agree such mat
determined by a neutral member of the boar
appointed and compensated in the same mann
inafter provided with respect to situations
members of the board are unable to agree up
Such neutral member shall cease to be a m
board when he has determined such matt
respect to any dispute or group of disputes th
the board designated by the carrier and the r
are unable to agree upon an award disposing
or group of disputes they shall by mutual agr
a neutral person to be a member of the b
consideration and disposition of such dispute
disputes. In the event the members of the boa
by the parties are unable, within ten days afte
to agree upon an award, to agree upon th
such neutral person, either member of th
request the Mediation Board to appoint such r
and upon receipt of such request the Med
shall promptly make such appointment. Th
son so selected or appointed shall be com
reimbursed for expenses by the Mediation Bo
members of the board shall be competent
award. Such awards shall be final and
both parties to the dispute and if in favor of
shall direct the other party to comply the
before the day named. Compliance with such
be enforcible by proceedings in the United
courts in the same manner and subject to
visions that apply to proceedings for enforce
pliance with awards of the Adjustment Boa

May 20, 1926, c. 347, § 3, 44 Stat. 578; Jun
691, § 3, 48 Stat. 1189; June 20, 1966, P
§§ 1, 2, 80 Stat. 208, 209; Apr. 23, 1970, P
§§ 1-6, 84 Stat. 199, 200.

STATEMENT OF THE CASE.

Petitioners, who were 59 empolyees of the Pullman Company and who were represented by six International Brotherhood Unions in the railroad industry, brought an action in the United States District Court for the Northern District of Illinois, Eastern Division, against the Pullman Company (herein called Pullman), the six International Brotherhoods (herein called Unions), and various railroads. The complaint in Count I sought to set aside the Public Law Board's award which ruled against the Petitioners. In Count II, it sought damages based upon a breach of the duty of fair representation owed by the Unions to the Petitioners. In Count III it alleged a conspiracy against the Petitioners by Pullman, the Unions and the Railroads. The Respondents filed with the District Court, motions to dismiss or motions for summary judgment. Before the District Court, the Petitioners agreed to dismiss all of the Count I allegation concerning the Public Law Board's decision. However, the Petitioners sought to pursue their rights under Counts II based upon the failure of the unions to represent the petitioners fairly. Further, Petitioners sought to pursue the conspiracy allegation of Count III emanating from the union's failure to properly represent them. The conspiracy involved not only the union, but Pullman and the Railroads. The District Court, in its opinion, dismissed the complaint on all three counts as to all of the Petitioners.

The Court of Appeals affirmed the dismissal by the District Court on all three counts as to all Petitioners. The affirmance of the dismissal. of Count I was correctly based upon Petitioners' agreement at the District Court level that Count I should be dismissed. The Court of Appeals affirmance as to the dismissal of Counts II and III was based upon the decision by the Public Law Board that the Petitioners' action for severance pay was without merit. The Seventh Circuit held that no independent right of action survived against the union, or

against the parties to the conspiracy which emanated from the union's failure to fairly represent the petitioners.

The Court of Appeals decision was rendered in spite of the fact that the Petitioners urged that the cause of action was maintainable under Title 28, Sec. 1337.

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Is in Direct Conflict with This Court's Decisions in the Case of Czosek v. O'Mara.

This Court has long held that a labor organization, particularly one in the railroad industry, has a special duty to fairly represent all employees in the bargaining unit whether or not they are members of that Union. The issue was presented to the Court and decided in the landmark case of *Steele* v. *Louisville and N. R. Co.*, 323 U. S. 192.

After clearly establishing that the members of the bargaining unit, even though a minority, have rights which must be protected, the Court then went on to consider what, if any, effect the Railway Adjustment Board and its availability to those members could have upon these rights of the bargaining unit members. The Court noted that the Adjustment Board has authority to grant relief as to petitioning employees against the employer. However, this court said that the authority in the Board is incomplete, particularly as to the rights of the minority employees against the labor union. This Court concluded that the employees must necessarily have the right to bring an action in court against the Union for damages which they may have suffered at the hands of their bargaining representative by its failure to adequately represent them.

> We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies

of injunction and award of damages when appropriate for breach of that duty. 323 U. S. 226 at page 207.

Following this clear statement of the rights of bargaining unit members, the Court has frequently been faced with various arguments by the Unions, which have attempted to frustrate the Union member's resort to the judicial system for damages based on a failure to represent. One of the clearest examples of this type of procedural defense interposed by a labor union as to the rights of its members to seek judicial remedies for breach of a duty to fairly represent is the case of *Czosek* v. *O'Mara,* 397 U. S. 26.

In that case we have employee members who were terminated by the employer-railroad and attempted to have the question of the propriety of their discharge litigated by the Railway Adjustment Board. However, the union refused to process the grievances and the employees brought an action against the union in the Federal District Court. The union defended by contending that the complaint was defective. It contended that the action should be dismissed because the complaint against the railroad was improper in that the members had failed to exhaust the administrative remedy under the Railway Labor Act. Also the Union moved to dismiss the complaint against them because the complaint failed to adequately allege a breach of duty and because the employees could have processed their own grievances. The District Court granted the motions and dismissed the complaint. Thereafter the Court of Appeals reversed the District Court with respect to the action against the union. The union sought Certiorari and this Court affirmed the holding of the Court of Appeals.

In the instant case, the Seventh Circuit based its affirmance of the District Court's dismissal upon the ground that the Public Law Board dismissal of the dispute against Pullman was sufficient to obliterate any right to bring an action against the Union for failure to represent the petitioners.

However, in the *Czosek* decision this Court, speaking through Mr. Justice White, specifically stated that an action against the

union for failure to represent, clearly survives the determination by the Railway Adjustment Board or any of its subsidiaries. On that point Mr. Justice White stated as follows:

> And surely it is beyond cavil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts. Glover v. St. Louis-S. F. R. Co., 393 U. S. 324, 89 S. Ct. 548, 21 L. Ed. 2d 519 (1969); Conley v. Gibson, *supra*. The claim against the union defendants for the breach of their duty of fair representation is a discrete claim quite apart from the right of individual employees expressly extended to them under the Railway Labor Act to pursue their employer before the Adjustment Board. [footnote omitted] 397 U. S. 26 at pages 27 and 28.

This clear and unequivocal statement of the rights of union members to pursue their union for breach of their duty to fairly represent, is ignored by the decision of the Seventh Circuit in affirming the dismissal of the complaint. It is apparent that the Seventh Circuit, being unable to distinguish, or find any way around this clear and unequivocal statement of the law in *Czosek*, decided that it must ignore that case and the language quoted above. The Seventh Circuit in its decision, nowhere discusses the *Czosek* case, but by its affirmation of the District Court, clearly violates the principle set forth above.

For this reason alone, this Court should grant the Writ of Certiorari.

II.

This Court Should Clarify the Important Federal Question of the Source of a Cause of Action by Union Members Against Their Labor Union for a Failure to Represent.

The decision of the Seventh Circuit presents an important question of federal law which should be decided by this Court. Clearly there is the direct conflict between the instant decision of the Seventh Circuit and of this Court's decision in *Czosek*

as set out in No. I above. However, possibly even more importantly the Seventh Circuit's affirmation of the District Court's dismissal, presents the important legal question of the source of the right to bring an action against a union for a breach of the duty of fair representation. In *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, the companion case to the *Steele* decision, *supra*, this Court said as follows:

> "We hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is a federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted' Deitrick v. Greaney, 309 U. S. 190. (citations omitted) The case is therefore one arising under a law regulating commerce of which the federal courts are given jurisdiction by 28 U. S. C. § 41(8)." *323 U. S. 210 at 213.*

Thus this Court clearly stated that the source of the cause of action is the federal law and that the right of action is founded upon the commerce provisions in Title 28 of the United States Code. Following the *Tunstall* decision, in 1948, the United States Code was revised, and Section 41(8) was renumbered to become the present day Section 1337. Therefore, the principal of *Tunstall*, quoted before, should be in existence today unless specifically overturned by intervening decisions. Such is not the case, as can be seen by reference to *Czosek* v. *O'Mara, supra.*

In *Czosek* this Court has continued to recognize the source of a claim against a union for breach of the duty of fair representation as emanating from the federal laws. This Court has continued to apply that principle and said so as follows:

> "The claim against the union defendant for breach of their duty of fair representation is a discrete claim quite apart from the right of individual employees expressly

extended to them under the Railway Labor Act to pursu
their employer before the adjustment board." *397 U. S*
25 at 28

Thus the decisions in *Tunstall* and *Czosek* make it clear tha
the source of the cause of action for breach of a duty of fai
representation is under Section 1337 for cases that emanate fro
the Railway Labor Act.[1]

However, some confusion has crept into the area of fai
representation suits since this Court's decision in *Vaca* v. *Sipe*
386 U. S. 171. That case arose under the Labor Managemen
Relations Act, but presented the same basic question of a breac
of the duty to fairly represent union members. This Court hel
that a union member has a right of action against his union f
the breach of that duty.

The confusion, as to the source of the cause of action, can
seen from the comments of David E. Feller, former Gener
Counsel for the United Steelworkers of America. Writing in
article titled, "Collective Bargaining Agreement" appearing
61 California Law Review at page 663, Feller said as follow
at pages 807 and 808:

> "It deserves emphasis, however, that the duty thus impos
> does not arise from an attempt to enforce conformity to t
> institutional forms the parties have created. It is, rath
> imposed from without. The delineation of the duty's co
> tours and the appropriate remedies to be applied when it
> breached are, therefore, not matters on which judicial det
> mination need conform to the intention of the parties. Th
> delineation should be consistent with the purposes of
> statute as a whole and the needs of the institution that
> statute is designed to both foster and regulate. But that
> not to say that the duty arises from contract.

---

1. Petitioners claimed a right before the Court of Appeals to
under Title 28, Sec. 1337 at page 13 in their reply brief where t
said:

> They drop all question of attacking the award rendered
> Public Law Board No. 507 as pertaining to them in t
> plaintiffs' position is that (page 4 of the plaintiffs' brief) t
> have the right to sue the unions under the Railway La
> Act under Section 1337, Title 28 of the U. S. Code
> U. S. C. A. 1337).

> Having said all this, it must now be added that the Court itself has been unclear as to the source of the duty it has imposed. It said, in *Vaca* that the duty is one derived from the National Labor Relations Act. But in *Humphrey* v. *Moore*, in *Vaca*, and finally, in a preemption case, *Motor Coach Employees* v. *Lockridge*, it also squarely rested jurisdiction over 'a suit . . . by a union member against his union' on Section 301, thus treating the suit against the union as one based on the collective agreement. In this, the Court was clearly wrong. The right conferred is one created by Section 9 and a suit to redress its violation should be maintainable not as a suit for breach of contract under Section 301 but, under Section 28 U. S. C., Section 1337, as a suit arising under a law of the United States Regulating Commerce.[2]

Although Feller may not be correct in his analysis of this Court's holding in *Vaca*, his statement illustrates the area of possible confusion in the minds of practitioners. Fortunately, this confusion is not shared by all of the Courts of Appeal. The Ninth Circuit Court of Appeals has held correctly that the cause of action is based on § 1337, *Retana* v. *Apartment, Hotel, Motel and Elevator Operator's Union*, 453 F. 2d 1018. On this question the Court specifically said:

> It is conceded that the district court had jurisdiction of the wrongful discharge causes of action under section 301(a) of the Labor Management Relations Act, 29 U. S. C. § 185(a). *See* Vaca v. Sipes, 386 U. S. 171, 186-187, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967).
>
> We conclude that the court also had jurisdiction to decide the fair representation claim under 28 U. S. C. § 1337. The duty of fair representation is a statutory duty implied from the grant to the union by section 9(a) of the National Labor Relations Act, 29 U. S. C. § 159(a) of exclusive power to represent all employees of the collective bargaining unit. Vaca v. Sipes, *supra*, 386 U. S. at 177, 87 S. Ct. 903, 17 L. Ed. 2d 842; Ford Motor Co. v. Huffman, 345 U. S. 330, 337, 73 S. Ct. 681, 97 L. Ed. 1048 (1953); Williams v. Pacific Maritime Ass'n, 384 F. 2d

2. For an earlier statement of the nature of the problem, see also, Labor and the Legal Process. H. Wellington, Yale University Press, 1968.

935, 936-937 (9th Cir. 1967). The National Labor R
tions Act is an "Act of Congress regulating commer
See Capital Service, Inc. v. NLRB, 347 U. S. 501, 504
S. Ct. 699, 98 L. Ed. 887 (1954). Suit for breach of
duty is one "arising under" such a statute within the m
ing of 28 U. S. C. § 1337.

* * * * *

This conclusion is supported by Tunstall v. Brotherh
of Locomotive Firemen, 323 U. S. 210, 213, 65 S. Ct.
89 L. Ed. 187 (1945), which holds that section 1337
fers jurisdiction upon federal district courts over suit
breach of a duty of fair representation implied from "
parable provisions of the Railway Labor Act." Ford M
Co. v. Huffman, *supra*, 345 U. S. at 337, 73 S. Ct. at
[Footnotes omitted] 453 F. 2d 1018 at pages 1021
1022.

The Ninth Circuit has effectively rejected any contract th
as the basis for a cause of action by a union member
failure to represent suit. Similarly the First Circuit in *DeA*
v. *Sindicato de Trabajadores Packinghouse AFL-CIO*, 425
281, stated:

> "We are therefore satisfied that any effort to charac
> plaintiff's suit against the union as a 'contract' action is
> unsound and unnecessary in order to effectuate ex
> federal labor policy." *425 F. 2d 281, 287.*

Thus, in both of the above cited cases, the Courts of A
have concluded that the rationale of the *Tunstall* case is
cable to cases that arise, not under the Railway Labor Ac
under the Labor Management Relations Act, and in line
the Court's decision in *Vaca* v. *Sipes*, 376 U. S. 171.

The decision by the Third Circuit in *Nedd* v. *United*
Workers, 400 F. 2d 103, also specifically discussed the
cability of Section 1337 to an action under *Vaca*. The
Court said as follows:

> "Thus Vaca v. Sipes indicates that the wrong pr
> in suit is not a violation of Section 301(a) and, at th
> time, that the claim may be of federal origin and
> zance, see 28 U. S. C. § 1337, because of its deri

from the National Labor Relations Act." 400 F. 2d 103 at page 106.

Thus the Ninth, Third and First Circuits are clearly applying this Court's principle enunciated in *Tunstall* and *Czosek*, to cases that arise under the Labor Management Relations Act and under the theory of *Vaca* v. *Sipes*. However, the Seventh Circuit, in the instant case, has fallen into the confusion mentioned by Feller in his article, but in a reverse manner. The decision of the Seventh Circuit applies the error of the contract theory arising since the *Vaca* type of case under the Labor Management Relations Act, to a case originating under the Railway Labor Act.

The source of the error in the Seventh Circuit decision, emanates from the fact that the Court confused the separate rights of the parties under the Railway Labor Act, with the separate and distinct rights of the Petitioners guaranteed by Section 1337. As clearly enunciated in *Tunstall* and reaffirmed in *Czosek*, the rights of union members to bring the action against their union arise from the federal law, but have their source in 28 U. S. C. § 1337.

The Seventh Circuit has committed the error which Feller alluded to in his article, and which he ascribed to this Court, concerning the right to bring a cause of action against the union under the Labor Management Relations Act. In the second paragraph of its order the Seventh Circuit states that the suit arises under the Railway Labor Act. However, in its footnote No. 1, that Court goes on to state that jurisdiction is also proper under the Labor Management Relations Act, § 185A and B. That gratuitous statement is a clear example of the source of the confusion by that court, that the cause of action is predicated on the contract theory.

This Court should decide the important question of federal law as to the right of union members to bring an action under § 1337. Since the source of the cause of action is § 1337, the Seventh Circuit decision was clearly erroneous when it denied the petitioner the right to proceed against the union based on the adverse decision of a Public Law Board.

CONCLUSION.

The Seventh Circuit decision is in error because it is
conflict with this Court's decision in *Czosek* v. *O'M*
should be overturned for this reason. Further, thi
should clarify the important legal question of the sou
union members right to bring suit against his union for
of the duty of fair representation under the Federal
structure.

It is respectfully submitted, that this Court has
remedies to the otherwise powerless employee who i
between the twin giants of the union and the emplo
together would ride rough shod over his various leg
All that the Petitioner requests is that the Court make
to them the remedy provided by Federal law. A Wri
tiorari should issue to review the judgment and opini
Seventh Circuit.

Respectfully submitted,

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APPENDIX.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Argued September 20, 1973
December 12, 1973

Before

Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

EVO R. MANZARDO, et al.,
Plaintiffs-Appellants,

No. 72-1891 *vs.*

THE PULLMAN COMPANY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72-C-23

James B. Parsons, Judge.

ORDER.

The district court dismissed—for failure to state a claim upon which relief could be granted—this suit under the Railway Labor Act[1] by 59 former employees of Pullman Company

1. Under 45 U. S. C. § 151, et seq. Although the parties cite jurisdiction under the Railway Labor Act, it appears that jurisdiction is also proper under the Labor Management Act, 29 U. S. C. §§ 185(a), (b).

(Pullman) against Pullman, 6 railroad labor org
(brotherhoods) and 25 railroads. We affirm.

Plaintiffs were members of various brotherhoods em
Pullman when on January 26, 1966 Pullman and the
Railway Labor Conference, bargaining representati
railroads under the Act, made an agreement under w
railroad took over the services of Pullman, it wo
terminated Pullman employees employment in their
class; and employees electing not to accept offe
"relinquish all protection" otherwise provided under
ment.[2] On January 16, 1969 a second agreement wa
Pullman and the brotherhoods providing for separat
ances for each Pullman employee in active service o
1, 1969 should he be furloughed and not employed
by a railroad.[3] The 1969 agreement provided also:

> The provisions of this Agreement do not a
> take-over of its sleeping car service by a railro
> subject is covered by the Agreement of January

On August 1, 1969 each defendant railroad too
Pullman services and plaintiffs' employment was
The brotherhoods' bargaining representative, System
No. 122, tried to obtain severance allowances for plai
the 1969 agreement. Pullman refused to pay the all
the ground that plaintiffs were discharged as a re
railroads' take-over under the 1966 agreement an
were expressly excluded from severance allowan
1969 agreement.

The railroads offered each plaintiff employment
the 1966 agreement. Plaintiffs' representative declin
so as not to prejudice the claim for severance pay
been filed under the Act, immediately after the Pulln
asserting that the refusal breached the 1969 agree

2. Article I, Section 4.
3. Article I, Section 1(a); Article III, Section 1.
4. Article II, Section 3.

representation then submitted the dispute between plaintiffs and Pullman to Public Law Board No. 507 (Board).[5] The Board's award denied plaintiffs' claims, holding that the relevant provisions of the 1969 agreement were inapplicable to plaintiffs.[6] The suit, trial and decision, and appeal before us followed.

The complaint seeks in Count I to set aside the Board's award against the plaintiffs; in Count II it seeks damages based on allegations of breach by the brotherhoods of their duty of fair representation of plaintiffs before the Board; and in Count III alleges that Pullman, the brotherhoods, and the railroads conspired to deprive plaintiffs of their severance allowances and seeks punitive damages. Defendants filed motions to dismiss or for summary judgment. The district court's Memorandum Opinion and Order granted the motions to dismiss as to all defendants.

A.

In plaintiffs' trial court memorandum they "dropped all question of attacking the award entered" by the Board.[7] Accordingly Count I is eliminated from our consideration.

---

5. A special arbitration board established in the 1969 agreement to resolve such disputes, and designated Public Law Board No. 507.

6. The Board also denied in the award similar claims of other Pullman employees.

7. "The lower Court did not consider any of the facts raised herein in reaching its decision nor did that Court consider the fact that plaintiffs-appellants in their Memorandum dropped all question of attacking the Award entered by Public Law Board No. 507." Pl. brief, p. 4. Had plaintiffs not abandoned Count I, it is probable that the district court's upholding of the Board's award would be sustained on the ground that the award is not "wholly baseless and completely without reason." *Gunther* v. *San Diego and Arizona Eastern Railway Co.*, 382 U. S. 257 (1965).

B.

Since the Board's award is not and cannot suc
challenged, Count III cannot be sustained, because
lenged award is, as the district court concluded, fin
binding; and under the award plaintiffs are not entit
ance allowances.[8] We need not cite authority fo
that since there is no "right" in plaintiffs to the seve
ances, defendants clearly cannot be liable for a de
that "right."

C.

The dropping of the attack on the Board's awa
however, preclude plaintiffs from asserting their
sentation charges against the brotherhoods in Cou

The district court noted that plaintiffs presented
evidence" that they had exhausted available uni
but the court did not decide plaintiffs' suit was ba
reason. The court dismissed Count II on the gro
complaint was "devoid of material facts" to suppor
of lack of fair representation and discrimina
brotherhoods.

In their complaint plaintiffs rely upon the foll
tions to supply the needed "material facts" to
claim: a) many employees received severance all
the railroads; b) the brotherhoods filed with, an
plaintiffs' claims before, the Board; c) the Board
relevant provision of the 1969 agreement that requi

8. The district court's Memorandum recites t
Board's award was made, and before plaintiffs here
United States District Court for the District of Columb
cases, *Dean* v. *Pullman Co.*, Civil Action No. 366
and *Opstad* v. *Pullman Co., et al.*, Civil Action
(1971), in favor of defendants where Dean and C
as plaintiffs do here, unfair union representation a
of defendants to deprive them of severance allowanc

mentation agreement under which plaintiffs, after termination, were to be offered employment which did not require a change of residence; d) plaintiffs were not offered such employment; e) plaintiffs' brotherhood representative declined offers of employment by the railroads; f) plaintiff Manzardo filed for the allowance under the 1969 agreement while on furlough, was recalled from furlough before his claim could be processed and was terminated August 1, 1969 without any severance allowance.

That "a)," many employees received severance payments is immaterial unless they were aided by plaintiffs' representative in order to discriminate against plaintiffs. Allegation "c)" seems inconsistent with plaintiffs' dropping their challenge of the award. That "d)," plaintiffs were not offered employment is inconsistent with allegation "e)." Furthermore, "e)," if true, may disclose a tactical decision by the representative, not a discriminatory one. And "f)" is not meaningful absent a challenge to the award.

A further allegation was that plaintiffs' representative did not bring the Board's decision to completion before August 1, 1970, a year after plaintiffs' termination. This naked allegation is meaningless absent specific allegations of fact regarding the delay and attributing the delay to the brotherhoods and not to the Board. Finally, the allegation that the representative took no appeal from the Board's award loses significance in view of plaintiffs' abandoned challenge of the award.

Plaintiffs' reliance upon this court's opinion in *Orphan* v. *Furnco*, 466 F. 2d 795 (1972), is misplaced. There plaintiffs' complaint "detailed the persistent efforts they undertook to persuade the Union to prosecute their grievances . . ." (at 803); we held that the complaint was sufficient to withstand a motion to dismiss. The present complaint is lacking in that same detail.

We hold, in the case now before us, that the district court did not err in dismissing Count II of the complaint. See *Lusk* v. *Eastern Products Corp.*, 427 F. 2d 705, 708 (4th Cir. 1970).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

EVO R. MANZARDO, et al.,
Plaintiffs,
vs.
THE PULLMAN COMPANY, et al.,
Defendants.

No. 72 C 23

MEMORANDUM OPINION AND ORDER

This case is before me today for rulings on various motions to dismiss and motion for summary judgment filed by the Pullman Company, a number of unions and brotherhoods and individual officers of said organizations and twenty-five railroads, all defendants herein.

Plaintiffs were members of craft unions employed by the Pullman Company which was engaged in the operation of sleeping car service for railroads. The Pullman Company supplied sleeping cars to the railroads and its personnel maintained and repaired these cars.

On August 1, 1969 each of the railroads withdrew from the arrangement with Pullman and each took over its own sleeping car service. Pullman, as a result of this withdrawal, terminated the plaintiffs' employment.

Two agreements existed at the time plaintiffs' employment was terminated which pertained to the protection of separated Pullman employees.

The first agreement, dated January 26, 1966 was executed between the National Railway Labor Conference (which is the authorized collective bargaining representative under the Rail-

way Labor Act for the defendant railroads) and the defendant unions and brotherhoods. The 1966 agreement deals with employees whose employment was terminated as a result of a railroad take-over of sleeping car service and includes provisions under which the railroads would offer employment to such Pullman employees. Article I, Section 4, of that agreement states:

> "Employes (sic) who elect not to accept employment for which they are qualified in their craft and class offered by the withdrawing carrier thereby relinquish all protection that might otherwise be provided them under the terms of this Agreement."

The second agreement, dated January 16, 1969, was negotiated between the Pullman Company and the union defendants and provides for a separation allowance for each Pullman employee in active service on January 1, 1969 in the event he was furloughed and did not obtain employment with a railroad company. A provision of Article II, Section 3 of the 1969 Agreement states:

> "The provisions of this Agreement do not apply to a take-over of its sleeping car service by a railroad, which subject is covered by the Agreement of January 26, 1966."

Upon the termination of plaintiffs' employment with Pullman, their collective bargaining representatives sought to obtain severance payments for them under the 1969 Agreement. Pullman refused to make any payments maintaining that plaintiffs had been discharged as a result of the railroad take-over and therefore, the terms of the 1969 Agreement were inapplicable to them.

The withdrawing railroads, in individual letters, then offered the plaintiffs employment for which they were qualified pursuant to the 1966 Agreement. Plaintiffs rejected these offers maintaining they preferred to press claims for severance pay rather than accept new employment.

After Pullman declined to honor the claims, defendant, Sy
tem Federation No. 122, which functioned as the bargainin
representative on behalf of the unions for the Pullman employe
submitted the dispute to a special arbitration board establishe
by the parties to the 1969 Agreement to resolve such disput
(Article IV of the 1969 Agreement). Authorization of su
Board is given by Section 3, Second of the Railway Labor A
45 U. S. C. A. 153, Second (Act). This arbitration board w
designated by the National Mediation Board as Public La
Board No. 507 (hereafter referred to as P. L. Board 507).

On August 10, 1970, P. L. Board 507 issued awards den
ing the claims filed on behalf of the plaintiffs and a number
other Pullman employees similarly situated, holding that t
provisions of the 1969 Agreement were inapplicable to t
plaintiffs.

After P. L. Board 507 rendered its decision, a former Pu
man employee (whose claim had been resolved by the awar
filed an action in the U. S. District Court for the District
Columbia against the Pullman Company, the collective b
gaining representative and the Richmond, Fredricksburg
Potomac Railway (all of whom are also defendants in t
case). *Dean* v. *Pullman Company*, Civil Action No. 3668
(D. D. C., 1971). The plaintiff, Dean, alleged that his un
breached its duty to represent him and that Pullman and
Railway had conspired to offer him employment on the Rail
for which he was unqualified thus depriving him of a separat
allowance under the 1969 Agreement.

The District of Columbia District Court held that the Aw
of P. L. Board 507 was "final, conclusive and binding."

A similar order was entered by the same Court in ano
action by a former Pullman employee (one of the plaintiff
this action). See *O. A. Opstad, Jr.* v. *The Pullman Comp*
et al., Civil Action No. 3670-70 (D. D. C., 1971).

Plaintiffs then filed the present complaint in which they
tend that Pullman did not comply with the provisions of

1969 collective bargaining agreement providing for separation pay to the plaintiffs.

Plaintiffs allege in Count I that the arbitration awards issued in resolution of their dispute with Pullman should be set aside. In Count II plaintiffs allege that the defendant unions breached their duty and discriminated against plaintiffs by not representing them fairly and impartially in their claims for separation pay. Count III alleges that Pullman and the defendant railroads conspired with the defendant unions to deny plaintiffs their separation allowances in violation of the 1969 Agreement. Plaintiffs seek compensatory and punitive damages under Counts II and III in the amount of $750,000, respectively.

As noted above, there are various motions to dismiss and motions for summary judgment filed by the numerous defendants. However, I find a common bond among the varied motions and that is that for the reasons that follow below plaintiffs cannot prevail in this action.

As heretofore noted the award of P. L. Board No. 507 was rendered pursuant to Section 153, Second, of the Railway Labor Act.

The jurisdiction of the Board is established by Section 153, First (i), of the Act which provides that:

> "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreement concerning working conditions, . . . may be referred . . . by petition of either party to the . . . Adjustment Board."

The award of P. L. Board 507 was predicated on the question of whether the failure to pay separation allowances to plaintiffs was a violation of the January 16, 1969 collective bargaining agreement. It is an issue which the Board clearly had jurisdiction to resolve since it concerned the proper application and interpretation of a collective bargaining agreement.

The record of the Board's proceedings indicate complete compliance with the requirements set down by the Railway Labor

Act. The parties were given the opportunity for a full hea and the Board in issuing its written award (concurred in by of the three Board members) clearly stated its findings conclusions.

In the present action plaintiffs maintain that the Board not properly interpret the relevant collective bargaining a ment.

Count I of the complaint alleges that the Board impro relied on the previous quoted provision of Article II, Secti of the 1969 Agreement:

> "The provisions of this Agreement do not apply take-over of its sleeping car service by a railroad, v subject is covered by the Agreement of January 26, 19

while ignoring the following provision of Article II, Sectio

> "An employee shall cease to be a protected emp in the event of his failure to accept employment offer him by the Company or a railroad company in whic can qualify under an implementing agreement to be between the interested carrier and any of the unior volved which does not require a change of residence.'

Plaintiffs maintain that none of them were offered em ment under implementing agreements not requiring a chan residence.

However, I find, as did P. L. Board No. 507 that the ary 16, 1969 Agreement is not applicable to this action be it expressly provides that it will not apply in the event take-over of sleeping car service by the railroads and the shows such a take-over.

The purpose of the provision which plaintiffs rely upon prevent employees who would otherwise be qualified for ance payments under the 1969 Agreement from obtaining payments if they refuse employment offered under the conditions.

The clause does not pertain to the plaintiffs because th visions of the agreement do not apply to them at all. Pl

fall within the exception to the 1969 Agreement which makes all the terms of that agreement inapplicable to them.

Thus, it is established that this Court agrees with the award of P. L. Board 507 and finds that it was valid. However, regardless of whether or not such agreement exists the award is final and binding.

Section 153(q) of the Railway Labor Act in dealing with judicial authority to set aside an award of a Public Law Board states:

> "The findings and order shall be conclusive on the parties except that the order of the division may be set aside for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or to confine itself to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

Plaintiffs' allegations do not relate to the jurisdiction of the Board nor to the requirements imposed upon the Board by the Railway Labor Act. Indeed, the allegations pertain to the proper interpretation and application of the collective bargaining agreement and thus are insufficient to justify the setting aside of the award or to raise issues concerning its validity.

The Supreme Court in *Gunther* v. *San Diego & Arizona Eastern Railway Co.*, 382 U. S. 257 (1965) in reversing a District Court which had set aside a Board award held that since the Board's award could not be said to be "wholly baseless and completely without reason" the District Court "went beyond its province" in rejecting it (*id.* at 261).

At page 263 the Court said:

> "This Court time and again has emphasized and reemphasized that Congress intended minor grievances of railroad workers to be decided finally by the Railroad Adjustment Board."

And, at page 264 the Court said:

> "The Railway Labor Act as construed in the foregoing and other opinions of this Court does not allow a federal

district court to review any Adjustment Board's de
tion of the merits of a grievance. . . . The basic g
here—that is, the complaint that petitioner has bee
fully removed from active service as an engineer be
health—has been finally, completely, and irr
settled by the Adjustment Board's decision. Conse
the merits of the wrongful removal issue as decide
Adjustment Board must be accepted by the District

In cases subsequent to the *Gunther* decision and t
Amendment to the Railway Labor Act (which include
stating that, in a review action, "the findings and order
the Adjustment Board shall be conclusive on the p
Courts have consistently refused to review the merits o
and have rendered summary judgments upholding the v
such awards where the statutory exceptions to the fi
awards were not established. *Dominguez* v. *National*
Inc., 279 F. Supp. 392, 394-95 (S. D. N. Y. 1968);
Florida East Coast Railway Company, 259 F. Supp. 3
54 Fla. 1966 (M. D. Fla. 1966); *Edwards* v. *St. L*
Francisco Railroad Company, 361 F. 2d 946, 952
1966); *Diamond* v. *Terminal Railway Alabama Stat*
21 F. 2d 228, 233 (5th Cir. 1970).

Having determined that the award is not "wholly bas
completely without reason" this Court may not review
of the award of P. L. Board 507. The award is a
binding determination of plaintiffs' rights.

The next issue to be resolved is that of Count II in
breach by defendant unions of their duty of fair and
representation is alleged.

Defendant labor organizations answer that plain
failed to resort to and exhaust the internal administra
dies available to them. In support of this argument d
tender affidavits detailing their Constitutions which p
the resolution and disposition of charges of aggriev
acts or omissions of the unions or their officers. Ea
Constitutions contains a prohibition against the filing

by a member who has failed to exhaust his internal union remedies.

Plaintiffs maintain they "have exhausted all remedies available to them under the contracts or which they were beneficiaries." However, with the exception of alleging that they urged "appeal" of the Board's award plaintiffs have demonstrated no concrete evidence of having exhausted available union remedies.

In a case which raised the issue of the duty of fair representation on the part of a union the Fifth Circuit said:

> ". . . the district court's jurisdiction can be invoked to prevent an illegal deprivation by a railroad brotherhood of the right to fair representation of its members both in bargaining and in enforcement of contractual rights. Where, however, it appears, without dispute, that the member has not pursued the appellate procedure available to him as a prerequisite to filing civil suit and that no basis for a finding that such appeal would be inherently futile or unfair has been shown, the courts should not undertake to direct the brotherhood members and officials how to handle their grievance procedures. *Fingar* v. *Seaboard Airline Railroad Company*, 277 F. 2d 698, 701 (5th Cir. 1960)."

The complaint contains charges of lack of fair representation and discrimination by the defendant labor organizations but it is devoid of material facts which might support such charges.

On the contrary, the affidavits filed in support of the defendant labor organizations strongly indicate a persistent effort by those organizations to obtain separation allowances for plaintiffs. The affidavits clearly exhibit that representatives of the organizations undertook to promptly process claims on behalf of the plaintiffs (as well as for other Pullman employees for whom they were successful).

In *Lusk* v. *Eastern Products Corporation*, 427 F. 2d 705 (1970) at pg. 708, the Fourth Circuit stated:

> ". . . the allegations of a complaint alleging a breach of a union's duty of fair representation must contain more than conclusory statements alleging improper representation;

> conclusory allegations without specifying supp
> to show the union's lack of good faith fail to s
> claim. *Balowski* v. *International U., United A*
> *Imp. Wkrs.*, 372 F. 2d 829, 835 (6 Cir. 1967);
> v. *Western Greyhound Lines*, 303 F. 2d 182,
> 1962), cert. denied, 371 U. S. 920, 83 S. Ct. 28
> 2d 229; *Brown* v. *Truck Drivers & Help. Loc.*
> *Baltimore Md.*, 264 F. Supp. 776 (D. Md. 19

Plaintiffs cite to the court a line of cases holding th
of a union's duty of fair representation under the Ra
Act is cognizable in the federal courts. *Vaca* v. *Sipe*
171, 185 (1967); *Czosek* v. *O'Mara*, 397 U. S. 25,
Steinman v. *Spector Freight Systems, Inc.*, 441 F. 2
(1971).

However, the Federal District Court in *Davids*
national U. U. A., A. & A. I. W., Loc. No. 1189, 3
375 (1971), succinctly stated this court's position in
bar at pg. 378:

> "Fatal to plaintiff's claim here is our finding
> no evidence to support a claim that the unio
> discriminatorily, or in bad faith failed to exha
> tractual procedures, as in *Vaca*, or that it did
> press plaintiff's claim fully and vigorously t
> allowed by the collective bargaining agreeme

In Count III plaintiffs allege a deliberate, willful a
conspiracy on the part of the Pullman Company an
ant railroads with the defendant unions to deny pl
separation allowances.

Plaintiffs allege in their answer to defendants'
"defendants have in their possession much docu
terial, which could possibly indicate conspiracy, imp
tation of facts to the Board, and relevant correspo
the plaintiffs are prevented from using because th
ruled against discovery by the plaintiffs until the a
are decided."

Plaintiffs have overlooked a basic proposition. A complaint must be based on facts and must state a claim upon which relief can be granted. Complaints are not to be filed in hopes that a search of defendants' files will turn up incriminatory evidence.

Plaintiffs have stated bare allegations of suspicion of conspiracy unsupported by facts and such conclusory allegations are insufficient evidence to allow a court to give plaintiffs' argument credence.

As the District of Columbia District Court found in *Dean, supra:*

> "The Court finds that the mere nebulous allegation of conspiracy without any significant factual assertions is only an attempt to relitigate the denial of the claim for separation allowance and should not be entertained."

Plaintiffs' allegations of an Employer-Railroad-Union conspiracy are conclusory and insufficient. No overt acts have been alleged. *Lusk, supra, Brown & Truck Drivers & Helpers Union No. 355,* 292 F. Supp. 125, 129 (D. Md. 1968), affirmed, 416 F. 2d 1333 (4th Cir. 1969). *Orphan* v. *Furnco Construction Company,* 325 F. Supp. 1220, 1222 (N. D. Ill. 1971).

Thus, I must hold that, with nothing more, conclusory allegations of union discrimination and employer-union conspiracy are insufficient to maintain this action particularly as the underlying dispute is one involving the interpretation of a collective bargaining agreement. As stated in a recent Seventh Circuit decision, *Slagley* v. *Illinois Central Railroad Company,* 397 F. 2d 546 at pg. 552:

> "The essence of the complaint is a claim for breach of contract by I. C. Resolution of the claim requires an interpretation of the contract. The dispute is therefore within the exclusive jurisdiction of the Adjustment Board. Cf. *Thompson* v. *New York Central R. Co.,* 2 Cir., 361 F. 2d 137 (1966); *Haley* v. *Childers,* 8 Cir., 314 F. 2d 610 (1963); *Ferro* v. *Railway Express Agency, Inc.,* 2 Cir., 296 F. 2d 847 (1961)."

It is most unfortunate that plaintiffs' expectations
fulfilled. Yet, the law is clear that where, as here, pla
failed to state a claim upon which relief can be grant
to dismiss the complaint as to all of the defendants
pursuant to Rule 12(b)(6) of the Federal Rules o
cedure.

I have elected to treat the motions for summary j
motions to dismiss and the granting of such motio
reasons herein and above stated, is hereby adjudg
and decreed.

Enter:

/s/ JAMES B. PARSONS
James B. Parsons
United States D

Dated: August 24, 1972

is cannot be
laintiffs have
ted, motions
; must ensue
of Civil Pro-

judgment as
ions, for the
ged, ordered

District Judge

BRIEF FOR THE RESPONDENTS IN OPPOSITION

MAY 1 1974

MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1482

EVO R. MANZARDO, et al., *Petitioners,*

v.

THE PULLMAN COMPANY, *et al., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS NORFOLK AND WESTERN RAILWAY COMPANY, SEABOARD COAST LINE RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, AND UNION PACIFIC RAILROAD COMPANY

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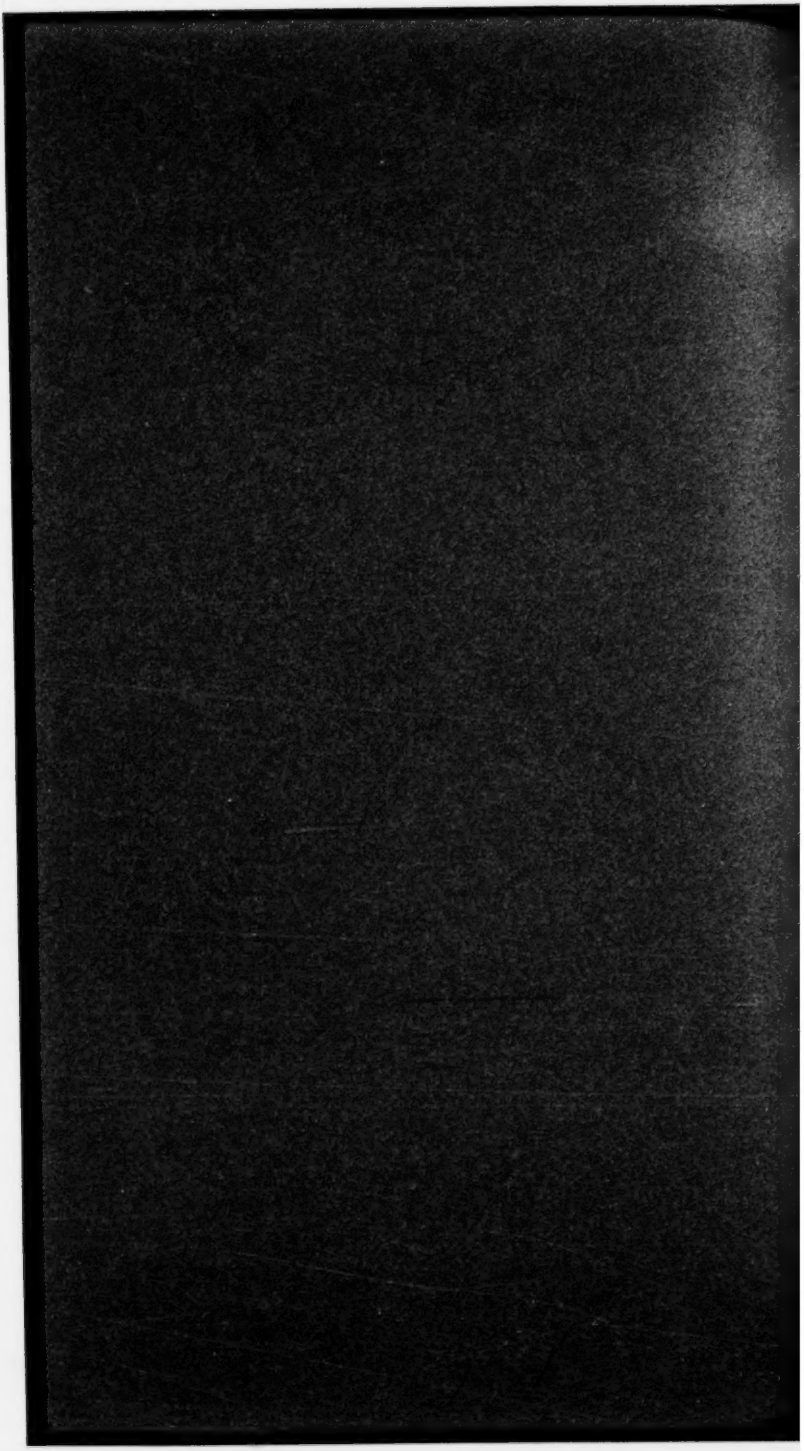

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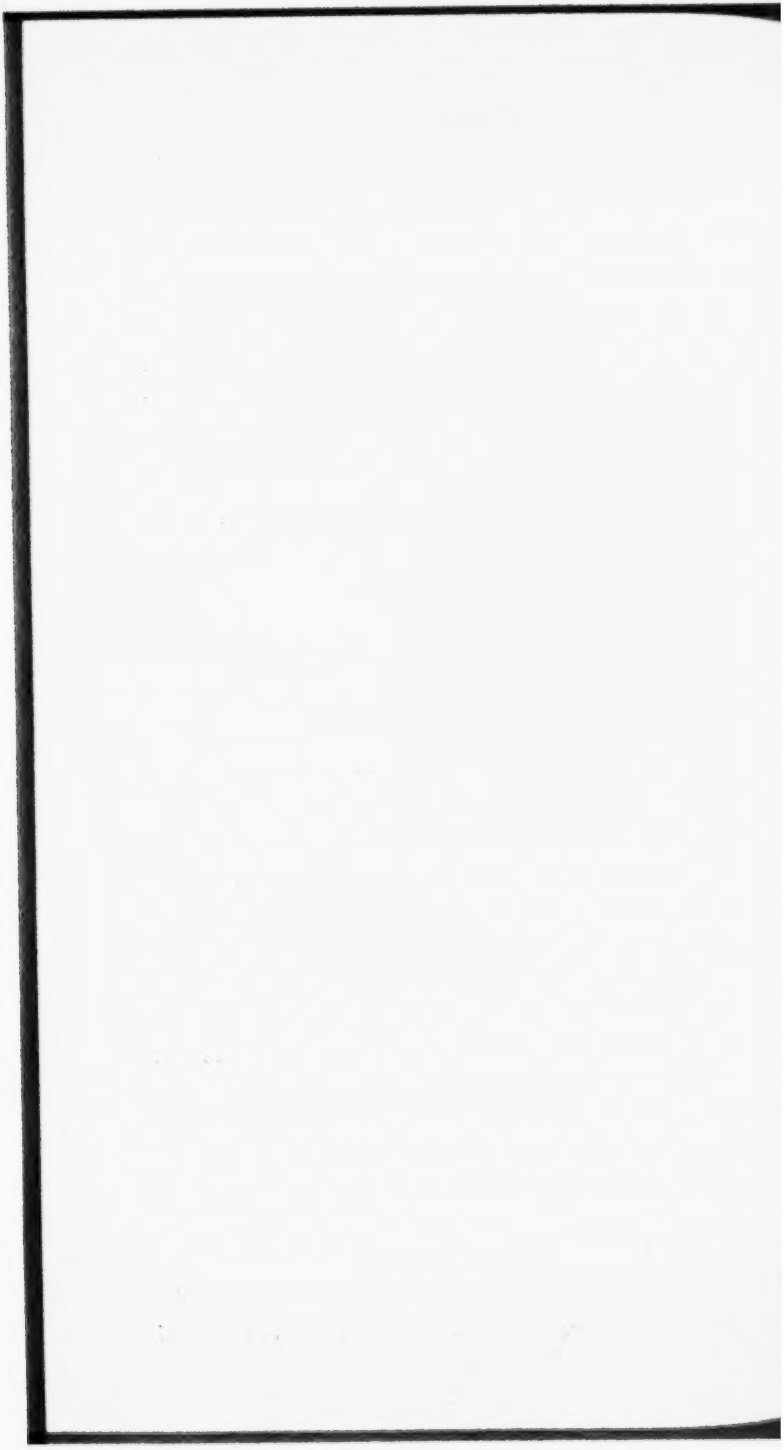

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OPINIONS BELOW

The opinions of the District Court (Appendix of Petition, pp. A6-A16) and of the Court of Appeals for the Seventh Circuit (Appendix of Petition, pp. A1-A5) have not been reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Under this heading, petitioners pretend that the decisi below is in conflict with prior decisions by this Court a that, in some manner, there is a question presented as to t source of an employee's right to complain of unfair rep sentation by a collective bargaining representative. Eve most casual examination of the decision below will dem strate, however, that no such questions are present Appropriate consideration of the issues raised and stated basis for the lower court's disposition of this c shows that the questions presented may be properly phra as follows:

1. Do the factual allegations of Count II of the c plaint state a cause of action against the defendant uni for breach of their duty of fair representation?

2. May petitioners recover punitive damages for alleged conspiracy to deprive them of a contract right w a conclusive administrative decision establishes that claimed right never existed?

STATUTES INVOLVED

The pertinent provisions of Section 3, Second, of Railway Labor Act are set forth at pages 2-4 of the Petit This case also involves the provisions of Section 3, F (q) of the Railway Labor Act which state:

> "(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court . . . a petition for review of the division's order. . . . The court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in

part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order."

STATEMENT OF THE CASE

This action arises out of petitioners' former employment by the Pullman Company.* Prior to August 1, 1969, the Pullman Company was engaged in the operation of sleeping car service on the passenger trains of various railroads throughout the country. The Pullman Company supplied sleeping cars to these carriers, and its personnel maintained and repaired those cars. On August 1, 1969, each of the carriers exercised its right to withdraw from this arrangement and each took over its own sleeping car service. As a result of this withdrawal, the petitioners' employment was terminated by Pullman.

At the time of petitioners' termination, there were in existence two agreements pertaining to the protection of separated Pullman employees. The first agreement, dated January 26, 1966 (Appendix, pp. 19 to 23), dealt specifically with employees whose employment was terminated as a result of a railroad take-over of sleeping car service. This agreement included provisions under which the withdraw-

* This Statement of the Case is based on the allegations of the complaint and the exhibits thereto. The complaint and the pertinent exhibits were reproduced as an appendix to the brief filed by the above-listed railroads in the court below. The references in this Statement are to that appendix.

ing railroads might offer employment to Pullman em
who were terminated as a result of the withdraw
agreement fixed the seniority status of former
employees who accepted employment with a with
carrier and incorporated the terms of a prior ag
which provided for the payment of moving expens
five-year compensation guarantee in connection w
job changes. The agreement contained the followin

> "Employees who elect not to accept employ
> for which they are qualified in their craft and c
> offered by the withdrawing carrier thereby r
> quish all protection that might otherwise be
> vided them under the terms of this Agreeme

The second agreement which was in effect w
tioners were discharged by Pullman, dated Jan
1969 (Appendix, pp. 7 to 12), provided separation
for certain discharged employees who did not ob
ployment with a railroad company. This 1969 A
contained the following clause which made it ina
to employees who were terminated as a result of a
take-over of sleeping car service:

> "The provisions of this Agreement do not a
> to a take over of its sleeping car service by a
> road, which subject is covered by the Agreeme
> January 26, 1966."

The 1969 Agreement also contained the follow
tration provision:

> "Any dispute involving the interpretatio
> application of any of the terms of this Agre
> not settled with the Company within thirty
> days after the date the dispute arises may b
> mitted by either party for a final and bi
> resolution in accordance with the provisio
> Section 3 of the Railway Labor Act, Amend

Following termination of petitioners' employment with Pullman, their collective bargaining representatives sought to obtain severance payments for them under the 1969 Agreement. Pullman refused to make such payments on the ground that petitioners had been discharged as a result of a railroad take-over of sleeping car service, and the terms of the 1969 Agreement were thus inapplicable to them. Shortly after petitioners' terminations, the withdrawing railroads, in individual letters to each petitioner, offered them employment for which they were qualified pursuant to the terms of the 1966 Agreement. These offers were rejected on the ground that petitioners preferred to press their claims for severance payments rather than to accept new employment.

Petitioners' collective bargaining representatives ultimately submitted their claims to Public Law Board No. 507, pursuant to Section 3 of the Railway Labor Act (45 USC Sec. 153) and the arbitration provision of the 1969 Agreement.* Public Law Board No. 507 resolved the dispute in favor of Pullman, holding that the provisions of the 1969 Agreement were inapplicable to the petitioners (Appendix, pp. 12 to 17).

After the issuance of this award, three employees whose claims had been resolved by the award (one of whom is also a plaintiff in this action) filed actions in the U.S. District Court for the District of Columbia against their collective bargaining representative, the Pullman Company, and the Richmond, Fredricksburg and Potomac Railway Company, all of whom are also defendants in this case. The complaint alleged that the union had failed to represent the plaintiffs fairly, that the railroad and Pullman had conspired to offer the plaintiffs work for which they were not qualified in order to prevent them from obtaining severance payments,

* The Special Boards of Adjustment provided for in Section 3 of the Railway Labor Act are designated as "Public Law Boards" by the National Mediation Board pursuant to published regulations of that agency (29 C.F.R. Section 1207.4).

and sought damages for loss of severance paym
District Court granted the defendants' motions
mary judgment, holding that the conclusory alle
conspiracy between the Pullman Company and th
were insufficient to alter the fact that the real dis
case involved the interpretation of the 1969 Agre
that the Public Law Board had exclusive juris
resolve this dispute (Appendix, pp. 23 to 27).

The petitioners then filed the complaint in
naming their collective bargaining representa
Pullman Company, and twenty-five railroads as d
In Count I, the petitioners sought to set aside th
Public Law Board No. 507. Count II sought
against the petitioners' collective bargaining r
tives on the ground that these representatives
their duty of fair representation in failing to s
process petitioners' claims for severance payme
III sought punitive damages against Pullman Co
the railroads on the ground that they "conspire
defendant unions and the brotherhoods to deny
their separation allowances, in violation of the
of January 16, 1969" (Appendix, p. 7).

Each of the defendants then moved to dism
summary judgment. The motions of the defendan
were supported by the affidavit of Harold M. W
neutral member of Public Law Board No. 507, w
that the positions of both parties were fully pres
Board and were given full and fair consider
Weston also attached to his affidavit the record
ceeding in which Public Law Board No. 507 d
tioners' claims. That record confirms that the a
product of a complete consideration of all mater
to the question of petitioners' contractual right

Petitioners required more than five months
their response to the railroads' motions, but we
present any counter-affidavits, to specify any
setting aside the award of Public Law Board N

suggest any basis for the allegation of conspiracy against the railroad defendants. The District Court subsequently granted the motions made by the railroad defendants, as well as the motions filed by the other defendants.

In the Court of Appeals, the petitioners abandoned Count I of their complaint, acknowledging that they had failed to allege any ground which would justify setting aside the award of Public Law Board No. 507, but pursued their argument that Counts II and III had been improperly dismissed. The Court of Appeals affirmed the District Court, holding that Counts II and III failed to allege facts sufficient to state claims upon which relief could be granted. The basis of the Court's conclusion with respect to Count III was that the railroad defendants could not be held liable for depriving petitioners of a right which the award of Public Law Board No. 507 conclusively established did not exist.

ARGUMENT

The Decision Below Is Consistent With The Relevant Prior Decisions And Is Clearly Correct.

The conflict of decisions upon which petitioners rely is based entirely on a misrepresentation of the decision below. Petitioners cite decisions which indicate that an action for breach of a union's duty to conscientiously handle an employee grievance survives an adverse determination of the merits of that grievance. Petitioners then assert that the Court below held that (Petition, p. 7):

> "the Public Law Board dismissal of the dispute against Pullman was sufficient to obliterate any right to bring an action against the Union for failure to represent the petitioners."

In fact, the Court below held that (Appendix of Petition, p. A4):

> "The dropping of the attack on the Board's award does not, however, preclude plaintiffs from asserting their unfair representation charges against the brotherhood in Count II."

The decision below correctly upheld the Distr
dismissal of Count II on the ground that the fa
in that Count were insufficient to establish a br
unions' duty of fair representation. That duty r
conscientious handling of grievances and, ther
hibits hostile, discriminatory or arbitrary unio
The allegations of Count II do not, however, i
facts which indicate that the unions had any poss
tion to discriminate against petitioners, or that
engaged in hostile, arbitrary or improper conc
kind. Instead, petitioners seek to support the
unfair representation by stating that the defen
unsuccessfully represented them before the
Board and then listing legal and factual argume
to the merits of the Board's decision. These
constitute nothing more than an attempt to
District Court to review and set aside the
Board's award despite the admitted absence of
statutory grounds upon which such action ca
This Court has frequently recognized that, in th
such grounds, the Railway Labor Act preclu
review of the merits of a Board award. In *Gu*
Diego & Arizona Eastern Railway Co., 382 U.
264 (1965), for example, the Court stated:

> "This Court time and again has emphasized
> emphasized that Congress intended mino
> ances of railroad workers to be decided fi
> the Railroad Adjustment Board.
>
> "The Railway Labor Act as construed
> foregoing and other opinions of this Court
> allow a federal district court to review an
> ment Board's determination of the mer
> grievance. . . . The basic grievance here—
> the complaint that petitioner has been wr
> removed from active service as an engineer
> of health—has been finally, completely, and
> ably settled by the adjustment Board's

> Consequently, the merits of the wrongful removal issue as decided by the Adjustment Board must be accepted by the District Court."*

The Court below was also clearly correct in upholding the District Court's dismissal of Count III of the complaint. The claim asserted in that Count is entirely premised on the conclusion that petitioners were entitled to severance payments under the 1969 Agreement. Count III repeats petitioners' factual and legal arguments regarding the merits of the award and alleges that The Pullman Company and the defendant railroads "conspired with the defendant unions . . . to deny plaintiffs their separation allowances, in violation of the Agreement of January 16, 1969." This conclusory allegation constitutes the only mention of the defendant railroads in the entire complaint and the sole basis of petitioners' claim for relief against them. The Court below recognized that in light of petitioners' abandonment of Count I of their complaint, the Public Law Board's award constitutes a final and binding determination that petitioners have no right to severance payments under

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* The decision in *Gunther* was announced prior to the 1966 Amendments to the Railway Labor Act. Those amendments revised the authority of the judiciary to review Adjustment Board awards by providing that, except for the limited and specific grounds for attack set forth in the Act itself (45 U.S.C. Sec. 153 First (q)), "the findings and orders . . . of the Adjustment Board shall be conclusive on the parties." See Senate Report No. 1201, June 2, 1966, 1966 *U.S. Code Cong. and Administrative News*, Vol. 2, p. 2287. Since the enactment of the 1966 Amendments, the lower courts have consistently refused to review the merits of Board awards. *Diamond* v. *Terminal Railway Alabama State Docks*, 421 F.2d 228 (5th Cir. 1970); *Northwest Airlines, Inc.* v. *Air Line Pilots Assn., Internat'l.*, 373 F.2d 136 (8th Cir. 1967); *Edwards* v. *St. Louis-San Francisco Railroad Company*, 361 F.2d 946 (7th Cir. 1966); *Dominguez* v. *National Airlines, Inc.*, 279 F. Supp. 392 (S.D. N.Y. 1968); and *Raabe* v. *Florida East Coast Railway Company*, 259 F. Supp. 351 (M.D. Fla. 1966).

the 1969 Agreement. As the Court below stated, "si there is no 'right' in plaintiffs to the severance allowa defendants clearly cannot be liable for a deprivation that 'right'" (Appendix to Petition, p. A4).

Petitioners' argument that this case presents an imp tant question of federal law is based on the same misr resentation of the decision below as is their claim o conflict of decisions. Petitioners repeat their assertion t the Court below "denied the petitioner the right to proc against the union based on the adverse decision of a Pu Law Board" (Petition, p. 13). Petitioners then argue t this result demonstrates that the Court below erroneou believed that the unions' duty of fair representation ar from the collective bargaining agreement rather than un federal law. As demonstrated above, however, the Co below expressly recognized that petitioners had a caus action under federal law for breach of their unions' duty fair representation and that this cause of action was in pendent of petitioners' rights under the collective barg ing agreement. Petitioners' claim was dismissed beca they failed to allege sufficient facts to establish a bre of the unions' duty and not because of any confusion w respect to the source or existence of that duty.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

.....
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.....
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No. 73-1482

In the Supreme Court of the United States

OCTOBER TERM, 1973

EVO R. MANZARDO, et al.,

Petitioners,

vs.

THE PULLMAN COMPANY, et al.,

Respondents.

On Petition for Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENTS, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SOUTHERN PACIFIC COMPANY, THE CHESAPEAKE AND OHIO RAILWAY COMPANY AND THE BALTIMORE AND OHIO RAILROAD COMPANY

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OPINIONS BELOW

The Opinions of the Court of Appeals for the Seventh Circuit and the District Court for the Northern District of Illinois, Eastern Division, appear in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set for
the Petition.

QUESTION PRESENTED

Did the Court of Appeals for the Seventh Circuit
the District Court for the Northern District of Ill
Eastern Division, correctly determine that petiti
failed to state a claim upon which relief can be grant

STATUTES INVOLVED

The statutes involved are adequately set forth i
Petition.

STATEMENT OF THE CASE

Except for petitioners' characterization of the Se
Circuit's decision—discussed hereinafter—the stat
of the case is adequately set forth in the Petition.

ARGUMENT

I. NO CONFLICT OF DECISIONS EXISTS

The decision below allegedly conflicts with *Czosek* v. *O'Mara,* 397 U.S. 25 (1970). In that case, former employees of a railroad filed an action against their union representative, for its refusal to process claims of wrongful discharge against their employer. This Court held that the employees could maintain such an action against their union representative, without regard to any right they had to pursue claims against their employer through the arbitration apparatus of the Railway Labor Act. Further, the complaint against the union was deemed sufficient to survive a motion to dismiss.

In *Csozek,* the union refused to process the employees' grievances. The facts here are markedly different. The union respondents processed petitioners' claims through the entire regular grievance machinery, to a final and binding decision by an arbitration panel denying those claims. The District Court recognized in its opinion the efforts of the union respondents by stating:

> "[T]he affidavits filed in support of the defendant labor organizations strongly indicate a persistent effort by those organizations to obtain separation allowances for plaintiffs. The affidavits clearly exhibit that representatives of the organizations undertook to promptly process claims on behalf of the plaintiffs (as well as for other Pullman employees for whom they were successful)." Appendix, p. 13.

In an attempt to create a conflict with *Czosek,* petitioners misstate the thrust of the Seventh Circuit's decision. Thus, at pp. 5-6 and 7 of their Petition, they state that the Seventh

Circuit held that no cause of action against th
for failure to represent could exist after the Pu
Board decided that petitioners' claims against t
ployer were without merit.

These misstatements are belied by the obser
the Seventh Circuit at the outset of its Opinion co
the alleged failure to represent:

> "The dropping of the attack on the Board
> does not, however, preclude plaintiffs from
> their unfair representation charges against the
> hoods in Count II." Appendix, p. 4.

The Court analyzed at length petitioners' alleg
failure to represent, and concluded that the Distr
did not err in dismissing Count II.

II. NO IMPORTANT QUESTION OF FEDERA IS PRESENTED

In their Complaint, petitioners alleged that the
arose under the Railway Labor Act, 45 U.S.C. §§1
In their Brief before the Seventh Circuit, they s

> "The plaintiffs-appellants' Complaint cont
> cient allegations to support a claim of breac
> of fair representation on the part of the Brot
> arising out of their position as employees co
> the Railway Labor Act (28 U.S.C.A. 1337 i
> basis of jurisdiction) under Counts I and
> Complaint." Appellants' Brief, p. 4.

This was the only reference to §1337 by petitioner

Perhaps taking petitioners at their word, the
Circuit stated that this suit arose under the Railw
Act. Petitioners now would seize upon that relia
jurisdictional statement in their own Complaint,
it up into a conflict with decisions of other
Appeals.

It appears settled that a suit arising under the Railway Labor Act *is* a "civil action or proceeding arising under [an] Act of Congress regulating commerce . . .", under Section 1337 of the Judicial Code.* Thus, the Seventh Circuit's decision in no way conflicts with those cited by petitioners.

But it must be remembered that the decisions of the courts below did *not* turn on a jurisdictional ground. Rather, the Complaint was dismissed for failure to state a claim upon which relief could be granted, under Rule 12(b)(6) of Federal Rules of Civil Procedure.

Bearing this in mind, it is evident that no important federal question is at hand.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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* *See International Association of Machinists* v. *Central Airlines*, 372 U.S. 683 (1963); *Felter* v. *Southern Pacific Co.*, 359 U.S. 326, 329 (1959).

CERTIFICATE OF SERVICE

I, C. George Niebank, Jr., Attorney of R
Respondents, The Atchison, Topeka and Santa F
Company, Southern Pacific Company, The Ches
Ohio Railway Company and The Baltimore and
road Company, in No. 73-1482 before the Supr
of the United States, do hereby certify that I
copies of the above Respondents' Brief in Op
certified mail, return receipt requested, upon
Woolley, 20 North Wacker Drive, Chicago, Ill
and Robert E. Fitzgerald, Jr., 53 West Jackson
Chicago, Illinois 60604, last known addresses of
of Record for Petitioners on this the 30th da
1974.

C. George Niebank, J

Record for
Fe Railway
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l Ohio Rail-
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served two
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Murray B.
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of Attorneys
ay of April,

JR.